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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

v.

KENT L. BARWICK, *et. al.*,

Respondents.

Brief of the Roman Catholic Archdiocese of New York and the Roman Catholic Diocese of Brooklyn, New York, as *Amici Curiae* in Support of the Petition for a Writ of Certiorari to the New York Court of Appeals

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Questions Presented

I. Is the matter ripe for adjudication?

II. Is the proffered "administrative remedy" illusory, religiously discriminatory and/or otherwise Constitutionally defective?

III. Does the New York City landmarks law, and the scenario whereby a building is designated as a landmark, meet the minimal Constitutional standards guaranteeing:

A. freedom from governmental interference with the free exercise of religion,

B. due process of law,

C. just compensation for a governmental taking of property, and

D. equal protection of laws?

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Interest of the *Amici Curiae*

The Archdiocese of New York is a diocese of the Roman Catholic Church with ecclesiastical jurisdiction in the Counties of New York, Bronx and Richmond in New York City, and in seven other counties of the State of New York. It is administered by the Archbishop of New York, His Eminence John Cardinal O'Connor, who exercises authority over 410 parishes having over 1,200 structures, serving an area with a total population of more than 5,000,000 of whom approximately 1,8000,000 are Catholics.

The Diocese of Brooklyn is a diocese of the Roman Catholic Church with ecclesiastical jurisdiction in the New York City Counties of Kings (Brooklyn) and Queens. It is administered by the Bishop of Brooklyn, His Excellency Francis J. Mugavero, who exercises authority over 221 parishes having over 600 structures, serving an area with a total population of more than 4,000,000 of whom approximately 1,400,000 are Catholics.

The interest of the *amici curiae* is not primarily based on the fact that they have contributed a very large number of low-rise, distinctive structures for the free enjoyment of all citizens. In fact, it is their desire and expectation that this ancient architectural tradition will continue. Far more importantly, they are

deeply concerned that, in the occasional cases wherein religious structures need to be modified, demolished or replaced in order to carry on the overriding religious mission and ministry of the *amici curiae* and of all religious owners, these valuable properties, and potentially all other resources of the owning religious organizations, resources that were and will be contributed to serve the cause of religion, are being confiscated by government without compensation to serve the non-religious cause, however worthy, of historic preservation.

The *amici curiae* urge this Court to recognize the harsh economic realities that make Petitioner's case ripe for adjudication, to recognize the illusory, discriminatory and unconstitutional nature of the proffered "administrative remedy," to recognize the fundamental importance of the Constitutional issues to a free society and to grant the petition for a writ of certiorari to the New York Court of Appeals.

REASONS FOR GRANTING THE WRIT

The *amici curiae* respectfully submit that there is persuasive reason for granting Petitioner's application for a writ of certiorari.

I. The matter is ripe for adjudication.

That the matter became ripe for adjudication at the moment in which Petitioner's house of worship was designated as a landmark is amply shown by the Petition herein and by the dissenting opinion below. It is, moreover, interesting to note that the majority opinion below nowhere denies any of the following facts:

A. That, from the moment of the landmark designation, Petitioner acquired and, at heavy additional cost, has been fulfilling the resultant new obligation to preserve the external historic appearance of its unwanted and religiously detrimental structure.

B. That, from the moment of the landmark designation, funds contributed and to be contributed for religious purposes by law must be, and have been, continuously diverted to serve the cause of historic preservation, contrary to the spending priorities established by the religious organization owning those funds.

C. That, from the moment of the landmark designation, criminal penalties have been in force to compel the perpetual, first-priority, allocation of the present and future resources of the religious organization (other than its landmarked structure), to the extent and in the manner deemed advisable by the government, to insure the perpetual preservation of the original appearance of the exterior of that structure.

D. That, from the moment of, and solely because of, the landmark designation, Petitioner has been unable to develop its real property in accordance with an "as-of-right" development plan available to all similarly situated non-landmarked owners, and that the resultant prevention of any income from its real property has constituted and continues to constitute a severe and ever-increasing daily economic loss to Petitioner, threatening its very existence as a religious (as distinct from a preservationist) community.

E. That Petitioner has not yet been able to present to a court the question whether the facts set forth above constitute governmental interference with the free exercise of religion because the case was disposed of summarily.

There is nothing more that can "ripen" with respect to the crushing impact of the landmark designation upon the Petitioner. *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305 (1974); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967); Davis, *Administrative Law*, Vol. 4, §25.7 (3d Ed.).

II. The "administrative remedy" proffered to Petitioner:

A. denies due process,

B. necessitates an unconstitutional entanglement by government with the internal religious affairs of Petitioner,

C. is illusory,

D. discriminates on its face against charitable (religious) owners.

A. Lack of Due Process

Petitioner ought not be forced to go through an "administrative remedy" procedure that would violate the Constitutional guarantee of due process of law. Such is the case here, because the

"administrative remedy" (the so-called "hardship relief" provisions of the New York City landmarks law) has the following characteristics:

1. It forces the religious owners to appeal before the same non-neutral (preservationist) Commission that had landmarked the building.

2. It does not allow any consideration of the issue whether the landmarking constituted governmental interference with the free exercise of religion or other asserted Constitutional infirmities.

3. It imposes the burden on the charitable (religious) owner to prove a specified type of economic "hardship" caused by the landmarking even though the owner had not been permitted, at the original designation hearing, to show economic, or other interference by the government with its charitable operations. At the initial designation hearing, the owner would not have had that burden of proof.

The situation described above violates Constitutional due process requirements. *Goss v. Lopez*, 419 U.S. 565, 580 (1975); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

B. Governmental Entanglement with Religion

To force a landmarked religious owner to now go through the "hardship relief" remedy would necessitate an unconstitutional entanglement by government in the owner's religious affairs. To determine "hardship" under the provisions of the law (which can only be hypothetical speculations in the case of charitable (religious) owners), the government would be obliged to compel the owner to disclose the following information in order to re-order the owner's spending and mission priorities so as to give absolute, first priority to the preservation of the historical appearance of the landmarked structure:

1. The amount of the religious owner's current income and reserve funds and other assets, including any non-landmarked structures.

2. The adequacy of the religious owner's fund-raising methods and spending policies, including the percentages of funds allocated to staff salaries, worship

and liturgy, religious ministry, educational ministry, humanitarian services, world mission support and building maintenance and repair.

Having extracted this data, the government forces, by threat of criminal sanction, the religious congregation to alter its spending priorities—for example, to reduce or eliminate staff, to sell or rent any of its non-landmarked structures, to curtail or eliminate some or all of its worship and other programs to the extent that the government feels such actions necessary or desirable to insure the preservation of the historical appearance of the landmarked structure. For example, if, in the government's opinion, facade cleaning were inadequate, the religious owner's failure to engage in (adequate) fundraising could be evidence of criminal intent to disobey the law.

These considerations apply with equal violence whether a religious organization needed to sell its structure for demolition, either to re-build or to finance its re-location, or whether it determined that its charitable programs needed funding more than the exterior appearance of its structure.

This fact-gathering, analyzing and re-prioratizing with respect to an organization's religious policies, programs and resources constitutes an extreme example of prohibited governmental entanglement in religious affairs. It is actually a government take-over of the religious policy-making function of a congregation. *Lemon v. Kurtzman,* 403 U.S. 602, 621 (1971); *Walz v. Tax Commission,* 397 U.S. 664, 674 (1970).

C. Illusory nature of the "hardship relief remedy"

No knowledgeable builder will contract to purchase a landmarked commercial structure to alter or demolish it (except perhaps at a distress price) because he could not afford to abide the delays, costs and uncertainties of the whimsical and illusory "hardship relief," or de-landmarking provision of the City landmarks law. But for a religious or other charitable owner, these procedures are even more illusory—they are structured so that religious owners can never furnish the proof of hardship required by the law and thus can never be de-landmarked except perhaps at the whim of a preservationist Commission.

A commercial owner can have its building de-landmarked if, among other things, it proves to the satisfaction of the Commission that the building cannot annually earn at least 6% of its assessed value. (The 6% standard is itself illusory. New York City assesses at about 50% of true market value; thus the 6% standard equals 3% of true market value. The City's professional realtors posit a 10%-12% return as necessary for economic viability.) Furthermore, the religious or other tax-exempt owner, in order to have its property de-landmarked, must *prove* to the satisfaction of the Commission that the landmarked building could not possibly earn each year 6% of its assessed value *if the building were not tax-exempt.* Any data on that point would, of necessity, constitute only speculation, never proof, especially as houses of worship have no record of gross or net income production, having been designed and used for worship, not for commerce. The Commission could *always* refuse to de-landmark a religious building for the "lawful" reason that there was no "proof" of how much income the building could or could not generate if it were not exempt from real property taxation. If the Commission did decide for some reason to de-landmark the building, it would have violated the "proof" requirements of its own statute.

If the Commission did violate its own statute and make a preliminary determination that "hardship" had been *proved* by a religious owner, then it could further delay a proposed sale while it tried to find *another* buyer who would purchase the building "on reasonably equivalent terms and conditions" but who would not alter or demolish the building. What builder would even sign a purchase-contract subject to the condition that he must wait for a year or more while the City tries to find someone else to oust him from his desired purchase?

If the Commission failed to find such a substitute purchaser, it can again further delay the contract sale by recommending that the City acquire, by forced condemnation, "a specified appropriate protective interest" in the building, commonly known as a "facade easement." Thus the City, for a few dollars,

for example, can purchase an easement covering a tiny portion of one wall of the building and thus effectively prevent that wall from being demolished and so effectively prevent the site from being re-used for a new building. Faced with such an outcome, what builder would ever sign a contract that would inveigle him into such a trap? He would simply elect to put his time and money into buying some other non-landmarked site. Thus the owner of the church or synagogue is deprived of its market value and has no choice but to forever preserve its unusable building as a museum of architecture.

D. Statutory Discrimination on face against charitable (religious) owners.

The so-called "hardship" relief provisions of the New York City landmarks law contain a detailed scheme of discrimination against religious and other charitable (tax-exempt) owners, and in favor of commercial and private owners. Thus, the law methodically discriminates in favor of owners who put net sales or rental proceeds in their own pockets and discriminates against owners who re-cycle such proceeds to aid recognized charitable purposes. References below are to the landmarking provisions of the New York City Administrative Code.

(1) Discrimination in the Requirements for Proving "Hardship"

If the Landmarks Preservation Commission makes a preliminary determination that a proposed alteration or demolition would impair the "special character" of a landmarked building, the owner may request that the building nonetheless be de-landmarked on the ground that the landmarking is creating a "hardship." The so-called "hardship" relief provisions of the law discriminate heavily in favor of commercial owners and against religious and other charitable owners, as the following statutory provisions amply demonstrate:

(a) A commercial owner can apply for "hardship" relief (i) if it seeks to demolish its landmarked building in order to construct a new building on the site §107-8.0-b.(1)(a) or (ii)

if it has contracted to sell its building or (iii) if it has leased its building for at least 20 years. But if a religious or other charitable owner desires the first of these three options, it is not eligible to apply for any type of hardship relief, and this is precisely the option Petitioner desires. The religious owner can apply for hardship relief *only* if it has contracted to sell or lease for 20 years. §207-8.0-a.(2)(a).

(b) The commercial owner can also apply for hardship relief for the purpose of altering or demolishing its building in order to terminate its operation on the site. §207-8.0-a.(1)(b)(1)(b). But if a charitable owner desires to do that, it is not eligible for any hardship relief. §207-8.0-a.(2)(d). Thus if communicants of a church or synagogue move to other neighborhoods, the congregation cannot re-locate. It is forever bound to the soil of its original site, obliged to use its resources to preserve in perpetuity its useless building for the sole benefit of those who think buildings are more important than worship and ministry—and who use religious resources to finance that perverse value system.

(c) A commercial owner can obtain "hardship" relief whether or not his landmarked building is still suitable for the business purposes for which the owner had been using it. A religious owner, however, is denied hardship relief if its building is still suitable for the owner's current purposes or if it is still suitable for the original purposes of the religious owner if that owner is still engaged in those purposes. §207-8.0-a.(2)(c). Thus, if a commercial owner has an uneconomical factory building he can get hardship relief even though the building is still suitable for factory use, but if a congregation has an uneconomical church building or synagogue building it cannot get hardship relief because its building is still theoretically suitable for worship.

(d) A commercial owner may apply for "hardship" relief on the grounds (among others) that he "seeks in good faith" to alter or re-construct the building if the Landmarks Preservation Commission should decide to de-landmark it. §207-8.0-a.(1)(b)(2). If a religious or other tax-exempt owner makes such an application, it must be on the grounds that it "seeks *and intends* in good faith" to alter or re-construct the

building if the Landmarks Preservation Commission should decide to de-landmark it. §207-8.0-a.(2)(d)(2). The underlined words indicate a harsher standard arbitrarily imposed on religious or other charitable owners.

(e) This same harsher standard is arbitrarily imposed on religious or other charitable owners who are seeking to demolish their landmarked buildings. Compare §207-8.0-a.(1)(b)(1) with §207-8.0-a.(2)(d)(1).

(f) A commercial owner, to show hardship, must prove, among other things, that its building cannot earn 6% of its assessed value per year. §207-8.0-a.(1)(a); §207-1.0-v. A religious owner in such case must prove that its house of worship could not earn 6% of its assessed value per year *if it were not tax-exempt.* §207-8.0-a.(2)(b); §207-1.0-v. This discriminates against religious owners, not only because economic *proof* can never be given for a non-possible hypothetical situation, but because the law assumes that all buildings are designed to produce income and that commercially useless buildings, designed for worship, while having "special character" for landmarking purposes, have no characteristic to permit de-landmarking.

(2) Discrimination with Respect to the "Alternative Plan"

If the Landmarks Preservation Commission determines that an owner has proved "hardship," it then begins the process of coming up with an "alternative plan" to try to find another builder who would develop the site but without altering or demolishing the landmarked building. The procedural requirements are arbitrarily made far more onerous for religious or other charitable owners than for commercial owners, as shown by the following statutory provisions:

(a) The Landmarks Preservation Commission, in devising its alternative plan, must consult with the commercial owner §207-8.0-b. In the same situation, however, there is no provision for consultation with a religious or other charitable owner. §207-8.0-i.(1). Thus the religious or charitable owner, but not the commercial owner, is prevented from contributing any "input" toward the formulation of the alternative plan and is kept "in the dark" about the fate of its own resources.

(b) The Commission's alternative plan may provide for full or partial tax tax abatement to alleviate economic hardship on a commercial owner. §207-8.0-c. Thus the law, while recognizing that landmarking imposes a special burden, provides no commensurate relief for tax-exempt owners. It has been suggested that this constitutes a dissipation of their constitutionally guaranteed tax-exemption.

(c) If a commercial owner does not like the Commission's alternative plan, he can reject it without giving any reason. §207-8.0-f.(2). A religious or other charitable owner, however, *must* accept the alternative plan, like it or not. §207-8.0-i.(2). Thus the religious, but not a commercial, owner is forced to contract to sell or lease for 20 years with some otherwise unknown substitute purchaser or tenant who may be financially unstable or otherwise unsuitable. The law gives the religious owner no protection against this.

(d) For a commercial owner, the Commission is allowed only 60 days to formulate its alternative plan. §207-8.0-d. For a religious or other charitable owner, it is allowed 180 days to formulate its alternative plan. §207-8.0-i.

(e) The City landmarks law forces a religious or other charitable owner to accept an alternative plan that is "reasonably equivalent" to the terms and conditions of the owner's original contract for sale or lease. §207-8.0-i.(1). As to commercial owners, however, the Landmarks Preservation Commission may not make *any* modification in their original contracts for sale, lease, self-development plans or otherwise. Thus, the bargain originally made by a religious owner, but not by a commercial owner, may be whittled away by the Landmarks Preservation Commission.

(f) For a commercial owner the Commission's alternative plan may permit certain "alterations, construction or reconstruction" not contained in the owner's original agreements. §207-8.0-c. No such leniency or flexibility is allowed religious or other charitable owners.

(g) Although a religious owner, unlike a commercial owner, has no right to reject a "reasonably equivalent" alternative

plan submitted by the Commission, the substitute purchaser or 20-year tenant who was discovered by the Commission is absolutely free, with total impunity, to repudiate that alternative plan even though it had previously agreed with the Commission to accept the plan. §207-8.0-i.(4)(a). Thus the fate of the congregation and its building is transferred to the hands of some strange purchaser or tenant with whom the religious owner never had any dealings and who, at the end of a tortuous de-landmarking proceeding, can reject the alternative plan and throw the religious or other charitable owner back to "square one." No such bizarre contingencies are placed on commercial owners.

(3) Discrimination After De-Landmarking Has Been Granted.

If a commercial owner has proven commercial "hardship" to the Commission's satisfaction and has rejected any alternative plan proposed by the Commission, and if the City has not condemned a facade easement, and when all waiting periods have expired, the Commission is required to issue a notice permitting the owner to proceed with its long-ago proposed alteration or demolition. This notice to proceed is unconditional. §207-8.0-g.(2). But if a religious or other charitable owner has "proven" hypothetical commercial "hardship" to the satisfaction of the Commission and if any new purchaser or tenant discovered by the Commission has rejected the Commission's alternative plan (the religious owner cannot reject the plan) and if the City has not condemned a facade easement and if the more extensive waiting periods applicable to religious and other charitable owners have all expired, the Commissioner is likewise required to issue a notice permitting the religious or charitable owner to proceed with its long-ago proposed alteration or demolition, but the notice to proceed is subject to the following conditions, none of which apply to commercial owners:

(a) The alteration or demolition work must be performed by the religious owner's original contract purchaser or 20-year tenant or the bona fide assignees of such purchaser or tenant (other than the religious or charitable owner itself). §207-8.0-i.(5)(a). If the original contract purchaser or 20-year tenant has gone bankrupt from waiting out this prolonged scenario or has

wisely decided to put its time and money into another non-landmarked location, the efforts of the religious or charitable owner to get de-landmarked are nullified and he is back to "square one" free to start another "hardship" relief application all over again. Thus the fate of the religious owner's building is taken from it and put in the hands of disinterested or perhaps, by this stage, hostile third parties. A commercial owner has no such burden.

(b) The religious owner's original contract purchaser or 20-year tenant must now, pursuant to §207-8.0.i.(5)(a), perform the demolition or alteration work in compliance with §207-8.0-a.(2). This latter Section provides for the furnishing of hypothetical "proof" to the Commission's satisfaction of the inability of the religious structure to earn a specified low commercial return, and for the furnishing of proof that the structure is not suitable for carrying out the owner's present and original charitable purposes, and it requires the "immediate" (sic!) initiation of demolition or alteration as originally proposed years before. If the contract purchaser or tenant does not do the work immediately and does not furnish the above-mentioned "proofs" of the current financial and corporate status of the religious owner, the de-landmarking is forfeited and the owner is back to "square one." The religious owner, unlike the commercial owner, is not allowed to do this work on its building; the congregation can only hope that these strangers will not abort the de-landmarking. Of course, if the economic climate has by then changed, these strangers may desire to abort the de-landmarking, and the law provides the religious or other charitable owner with absolutely no protection against this.

(c) For religious or other charitable owners, the now-permitted alteration or demolition must be undertaken with "reasonable promptness" after the issuance of the notice to proceed. §207-8.0-i.(5)(b). No time requirement of any sort is imposed on commercial owners in this situation.

(4) Discrimination as to the Beneficiaries of De-Landmarking

If a commercial owner proves "hardship" and is de-landmarked, it directly receives all the benefits of the de-landmarking whether as owner of a now de-landmarked unencumbered building or as the beneficiary of a sale or a 20-year lease with either its original purchaser or tenant or, at its option, the new purchaser or tenant discovered by the Commission. A religious or other charitable owner, however, can never again own its de-landmarked building unencumbered because it was not even eligible for hardship relief if it desired to develop and continue to own its land or building. In the case of a contract of sale or a 20-year lease, the religious or other charitable owner has nothing to say about whether it will be dealing with an originally intended purchaser or tenant, or one later discovered by the Commission. And in the latter case, the law makes it painfully clear that the religious or other charitable owner is to have no benefit by providing that the charitable owner *must* enter into an agreement of purchase or lease with the new purchaser or lessee discovered by the Commission, §207-8.0-i.(2), and that the "provisions of this section (prohibiting issuance of demolition or alteration permits unless the law's provisions concerning proof of 'hardship,' the alternative plan and the City's purchase of a facade easement have all been complied with or have time-expired) shall not, after the consummation of such agreement, apply to such purchaser or tenant (discovered by the Commission) or to the heirs, successors or assigns of such purchaser or tenant." §207-8.0-i.(3). So it is clear that the law takes elaborate steps to insure that if a religious or other charitable owner successfully completes a hardship relief procedure, the benefits of its efforts will be conferred on a purchaser or tenant, preferably one discovered and imposed on that owner by the Commission. A commercial owner is not subject to this fatal requirement.

It is clear from the foregoing that the City landmarks law contains a studied pattern of blatant discrimination against religious and charitable owners, as opposed to commercial owners, to make it impossible for them to ever find a builder who would be insane enough to contract to buy their landmarked properties.

III. The New York City landmarks law, and the scenario whereby a building is designated as a landmark, utterly fail to meet the minimal Constitutional standards guaranteeing:

A. freedom from governmental interference with the free exercise of religion;

B. due process of law;

C. just compensation for a governmental taking of property; and

D. equal protection of laws.

A. The unwanted designation of Petitioner's house of worship or any house of worship as a landmark results in governmental interference with the free exercise of religion.

The *amici curiae*, with all the religious communities of our nation, have erected and maintained over the centuries at their own cost, more low-rise, distinctive structures, by far, than any other societal group. Although any passerby is free to enjoy these churches, synagogues and temples, they were built, not for the passerby, but rather to promote the worship of God, to nourish the spiritual life of men and women and to help them better serve their fellow man. The *amici curiae* and the entire religious community of our nation are now profoundly distressed to see the government inverting these values by making these structures more important than the God and the people the structures were erected to serve. The religious communities see the government deciding the budgetary priorities of congregations, forcing their funds to be used, into bankruptcy if necessary, to preserve outmoded and useless structures that now impede the religious mission they were erected to promote. They see government "fossilizing" their structures, thereby preventing alterations needed to carry on religious worship and ministry. They see the perpetual encumbrancing of their lands with "white-elephant" structures thereby destroying the fair resale value of the land so that they can never finance the construction of a new structure to serve people in a new location. They see that, in being thus forever "bound to the soil," they will be unable to continue their centuries-old tradition of incidentally contributing to our architectural heritage by erecting new buildings in new styles of architecture. They

see government "establishing" historic preservation as a cause and value automatically higher than that of religious, educational and humanitarian programs offered to the public by the religious communities and the commandeering of religious resources to finance that value-system. They see preservationists conspiring with "neighbors" who abuse the landmarks laws to preserve their apartment views over low-rise religious structures, thereby imposing illegal spot-zoning on worshipping communities.

The attempted extermination in this case of Petitioner's religious life is only one example. Every fair-minded citizen, whether religious, non-religious or anti-religious, would recoil, as would the framers of our Constitution, at such governmental strangling of religious and related charitable activity.

The problem is nationwide—Boston, San Francisco, Chicago, Buffalo, New York City, to name some places where it has publicly surfaced. In New York State there are about 110 local landmark ordinances, most of which have no hardship relief provisions and all but one or two of which suffer from the same Constitutional defects as the New York City ordinance.

Our nation will rise or fall, not on the quality of our buildings but on the quality of our peoples who in disproportionately large numbers look to the religious communities of America for the spiritual, emotional, humanitarian and material support that the government cannot, and often should not, provide. To permit government to stifle these programs for the benefit of an aesthete elite would be to promote that decadence which some doomsayers claim is already overtaking us.

B. The designation of Petitioner's house of worship as a landmark was effected without due process of law.

The designation of a structure as a landmark is the result of a scenario (a term not lightly chosen) conducted by the New York City Landmarks Preservation Commission that falls far short of Constitutional "due process" requirements. The scenario has the following characteristics:

1. If a structure is 30 years old, the *only* standard needed to make it eligible for designation as a landmark is that it have "special character," an undefined term. No historical or architectural distinction is required. There is no building that

does not have at least some such "special character." Such a "standard" is unconstitutionally vague. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

2. The Commission cannot, by law, take into account the impact, economic or otherwise, that the landmark designation would have on the ability of the religious owner to continue to carry out its religious worship, mission and ministry, or whether it would result in any other Constitutional violation.

3. The Commission schedules a structure for a public hearing on the issue of whether or not the structure should be designated as a landmark by accepting the recommendation and report of its own internal staff that the structure should be designated as a landmark—thereby holding a "public hearing" to determine the very issue it has already determined.

4. The "testimony" at the public hearing is not under oath.

5. The "testimony" on the only issue allowed by law to be considered, namely whether the structure has at least some "special character," is given by witnesses who have no expertise or who are not required to prove their expertise in the field of the special character of structures.

6. Such testimony is accepted from anyone who asks to speak at the "public hearing," whether or not he or she has any legally cognizable interest in the matter.

7. The (complete) file of the Commission relating to the affected structure may or may not, at whim, be made available to the (religious) owner prior to or after the "public hearing."

8. Post-hearing documentary "evidence" may at any time be placed by anyone in the official file of the Commission, prior to its decision. Copies of such "evidence" are not furnished or required to be furnished to the (religious) owner. Since the Commission does not disclose to the owner when its file on a given structure is to be deemed "closed" in preparation for the rendering of the decision, the owner never knows what "new evidence" may have been placed in the file and thus never has the opportunity to rebut such "new evidence."

9. The Commission, as a matter of announced policy, arranges with the city buildings department to deny alteration

or demolition permits for (religious) structures prior to its decision on whether to designate the structure as a landmark, thus "extra-legally" treating unlandmarked structures as if they were landmarked.

10. The Commission can and does defer its decisions indefinitely so that the (religious) owner's position is frozen and it can neither go forward with a judicial appeal nor proceed with its desired modification or other disposition of its structure.

Petitioner has not yet been able to present to a court the question whether the landmark designation scenario described above meets minimal Constitutional standards of due process of law because the case was disposed of summarily. *Goss v. Lopez*, 419 U.S. 656, 580 (1975); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

C. The designation of Petitioner's house of worship as a landmark constituted an unconstitutional taking of property without just compensation.

It is sometimes said that the government is not constitutionally required to compensate an owner for loss resulting from the designation of his structure as a landmark because such a designation is not a "taking" by exercise of the power of eminent domain but rather is the exercise of the "police power" whereby every owner is (rightly) required to maintain and operate his structure so as not to endanger the safety, health or morals of the public. The fundamental distinction between an eminent domain "taking" and an exercise of the police power set forth by Professor Freund in his classic treatise, *The Police Power* at §511, pp. 546-547, is as follows:

> "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the differences between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not."

The New York City landmarks law provides for no compensation for value loss resulting from the imposition of a landmark designation. Yet it cannot seriously be said that the construction

and maintenance over the decades of a (religious) building of "special character" has been harmful to the public. On the contrary, the Landmarks law does not seek to have the landmarked structure razed as dangerous to public safety, health or morals, but rather seeks to force the (religious) owner to preserve it in perpetuity for the benefit of that aesthetically sensitive portion of the public that is able to discern and enjoy its "special character."

This injustice is compounded in landmarking situations. Normally, when the government takes over a building, whether or not for just compensation, it also takes over the cost of maintaining it. As a result of landmarking, however, the religious owner is forever burdened with the cost of maintaining its religiously detrimental structure for the delectation of those passersby who take pleasure in architectural forms.

There is no overriding or compelling state need to landmark religious structures even if the landmarking standards and procedures met minimal Constitutional standards, for the following reasons:

1. It is the centuries-old tradition of our religious communities to erect and maintain low-rise, distinctive houses of worship. This ancient tradition will continue so long as religious congregations have a viable religious life. Every citizen is free to enjoy those buildings whether or not landmark designations are on file. In fact, the buildings existed long before the landmarks law.

2. In those instances when a structure impedes the religious purposes it was erected to serve, the state's overriding and compelling interest is in preserving religious freedom and the religious, educational and humanitarian ministries sponsored by religious organizations—not in preserving every last distinctive building.

3. By fossilizing existing buildings, the landmarks law prevents the release of funds that would be used, where a congregation seeks to relocate, to construct a new house of worship in contemporary architectural style. The law thus cuts off our nation's primary source of future distinctive buildings.

It has been said that this Court has decided that there never need be compensation in landmarking cases, citing *Penn Central Trans. Co. v. City of New York*, 42 N.Y.2d 324, *aff'd* 438 U.S. 104, *reh. den.* 439 U.S. 883 (1978). In fact, however, it was clear that the landmarked owner (Penn Central) received just compensation for the landmarking in the form of expanded transferability of its development (air) rights that increased the value of these rights by many millions, a benefit available *only* because the structure had been landmarked.

Petitioner has not yet been able to present to a court the question whether the landmarking of its church structure constituted an unconstitutional "taking" without just, or any, compensation, because the case was disposed of summarily. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Matter of Westchester Reform Temple v. Brown*, 22 N.Y.2d 488 (1968).

D. The New York City landmarks law deprives Petitioner and the public of equal protection of law.

Under the New York City landmarks law, any item of real or personal property over 30 years old (except interiors of houses of worship) *may* be "nominated" for designation as a landmark either by the Landmarks Preservation Commission or anyone else. However, the law does not *require* the Commission to consider any particular structure, no matter how beautiful, for designation, nor to act upon any request for designation. Thus, the Commission may, at whim, refuse to consider one structure of "special character" but accept for consideration another structure of "special character" (in which latter case designation would be required). For example, when a major New York City developer, Ronson, unearthed the historically important and remarkably preserved hull of an 18th Century merchant ship (the "Ronson Ship"), the Commission was notified but felt that preservation of the hull would be too costly for the developer and simply never scheduled the property for a hearing. Instead, it held a parade at the site to signify the exceptional "special character" of the property and then allowed its destruction so the construction of Ronson's high-rise building would not be delayed. Had a designation hearing been scheduled, of course,

Ronson's economics could not have been considered—only whether the property had "special character."

Again, the Commission decided that the convent of the Little Sisters of the Assumption in Manhattan lacked any "special character," thereby permitting its destruction so that the owner could realize the fair market value of the site. Even superficial comparison would make it apparent that the Convent had far more "special character" than Petitioner's structure.

A law that permits, with impunity, unequal treatment among owners of buildings of "special character" denies the public in general, and Petitioner in particular, the equal protection of law guaranteed by the Constitution. *Carey v. Brown*, 447 U.S. 455 (1980); *Brown v. Board of Education*, 347 U.S. 483 (1954).

Petitioner has not yet been able to present to a court the question whether the New York City landmarks law violates the equal protection guarantee of the Constitution because the case was disposed of summarily.

CONCLUSION

For all the foregoing reasons, the *amici curiae* respectfully urge that a writ of certiorari be issued to the New York Court of Appeals in this case.

Respectfully submitted,

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